IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PEYTON BRYANT,	)	
	)	
Plaintiff,	)	
	)	CIVIL NO. 1996-121
v.	)	
	)	
THOMAS HOWELL GROUP,	)	
	)	
Defendant.	)	
_____	)	(consolidated)
	)	
CYRIL DONOVAN and ETHEL DONOVAN,	)	
	)	
Plaintiffs,	)	
	)	CIVIL NO. 1997-59
v.	)	
	)	
THOMAS HOWELL GROUP,	)	
	)	
Defendant.	)	
_____	)	

APPEARANCES:

Glenda Cameron, Esq.
Law Offices of Lee J. Rohn
1101 King Street, Suite 2
St. Croix, U.S.V.I. 00820
Attorney for Plaintiffs

Michael Sanford, Esq.
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1 Queen Cross Street
St. Croix, U.S.V.I. 00820
Attorney for Defendant

MEMORANDUM OPINION

Finch, C. J.

This matter comes before the Court on the following motions: (1) Plaintiffs Peyton Bryant ("Bryant") and Cyril and Ethel Donovan's ("Donovan") Request for Oral Argument and Evidentiary Hearing; (2) Defendant Thomas Howell Group's ("THG") Motion to Strike the Attachments to Plaintiffs' Request for Oral Argument and Evidentiary Hearing; and (3) Defendant THG's Motion for Sanctions. For the reasons expressed below, the Court will (1) deny Plaintiffs' Request for Oral Argument and Evidentiary Hearing; (2) grant Defendant's Motion to Strike the Attachments to Plaintiffs' Request for Oral Argument and Evidentiary Hearing; and (3) grant Defendant's Motion for Sanctions.

I. Background

The following alleged facts are common to each of the consolidated cases presently before the Court.[1] Defendant THG was retained by the insurance carriers for the various Plaintiffs to adjust property damage claims following Hurricane Marilyn. Plaintiffs' allegations against Defendant include, but are not limited to, bad faith, breach of fiduciary duty and fair dealing, tortious interference of contract, intentional and negligent infliction of emotional distress, negligent adjustment practices, and breach of contract. In addition to the above allegations, certain individual Plaintiffs have alleged additional counts.

The instant motions arise out of Defendant's Motion for Summary Judgment. Subsequent to Defendant filing its summary judgment motion, Plaintiffs sought and received several extensions of time within which to file their response to Defendant's motion. In the final Order

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[1] Bryant and Donovan are also consolidated with Benjamin v. Thomas Howell Group, Civ. No. 1996-71. However, because Chief Judge Finch recused himself in Benjamin, that case is before Judge Moore.

granting Plaintiffs' request for extension of time, the Court indicated, for the second time, that this would be the last extension of time that it would grant to Plaintiffs.[2] See Order dated January 12, 2000. The Order further stated that if Plaintiffs failed to submit their response by January 19, 2000, the date of the last extension, the Court would rule on Defendant's Motion for Summary Judgment without benefit of Plaintiffs' response. Id.

The final deadline of January 19, 2000 passed without Plaintiffs filing a response to Defendant's summary judgment motion or requesting an enlargement of time to respond. Pursuant to this Court's January 12, 2000 Order, Defendant submitted its Motion for Summary Judgment, together with the supporting documents, and requested that the Court rule on Defendant's unopposed motion. Plaintiffs in turn filed a motion *nunc pro tunc* for extension of time to respond. On February 4, 2000, this Court entered an Order denying Plaintiffs' motion for extension of time *nunc pro tunc*.[3] See Order dated February 4, 2000.

Plaintiffs have now filed a request for oral argument and evidentiary hearing to which Plaintiffs have attached as an exhibit their untimely response to Defendant's Motion for Summary Judgment. In response, Defendant moves (1) to Strike the Attachments to Plaintiffs' Request for Oral Argument and Evidentiary Hearing and (2) for Sanctions.

II. Analysis

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[2] Both the second and third extensions stated that Plaintiffs' counsel would be allowed no further extensions. However, the Court "reluctant to foreclose Plaintiffs' defense because their attorney is too busy with other cases" granted Plaintiffs' third motion for extension of time. Order dated January 12, 2000.

[3] On February 10, 2000, Judge Moore entered an Order denying the same in Benjamin v. Thomas Howell Group, Civ. No. 1996-71.

I. Request for Oral Argument and Evidentiary Hearing

Pursuant to Local Rule 7.1(i),[4] Plaintiffs request an oral argument and evidentiary hearing on Defendant's Motion for Summary Judgment. Rule 7.1(i) provides:

> Oral argument may be set on written notice therefor, or the court may, in its discretion, order oral arguments on any motion. A request for oral argument shall be separately stated by the movant or respondent at the conclusion of the motion or response.

LRCi 7.1(i) (2000).

The Third Circuit has held that no hearing is necessary where a party fails to respond to a summary judgment motion. Anchorage Assocs. v. Virgin Islands Bd. of Tax Review and Tax Assessor, 922 F.2d 168, 176 (3d Cir. 1990) ("While Rule 56 speaks of a 'hearing,' we do not read it to require that an oral hearing be held before judgment is entered."); see also Geear v. Boulder Community Hosp., 844 F.2d 764, 766 (10th Cir. 1988) (where non-moving party fails to respond to summary judgment motion within time period provided by local rule, district court review of briefs and other materials submitted in support of motion satisfied "hearing" requirement of Rule 56), cert. denied, 488 U.S. 927 (1988); Donaldson v. Clark, 819 F.2d 1551, 1555 (11th Cir. 1987) ("Rule 56 does not require that an oral hearing be held on a summary judgment motion."); Langham-Hill Petroleum Inc. v. Southern Fuels Co., 813 F.2d 1327 (4th Cir. 1987), cert. denied, 484 U.S. 829 (1987) ("there is no absolute requirement that a ruling on a motion for summary judgment be preceded by a hearing"). Furthermore, the Court finds that Plaintiffs' Motion for Oral Argument and Evidentiary Hearing is merely Plaintiffs' attempt to avoid the Court's denial of Plaintiffs' Motion for Extension of Time to respond to Defendant's

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[4] Plaintiffs, in error, cite Local Rule 7.1(g).

summary judgment motion. Accordingly, the Court will deny Plaintiffs' request for oral argument and evidentiary hearing.

II. Motion to Strike

Defendant's argue that, pursuant to Local Rule 7.1(j), the Court should decline to consider Plaintiffs' untimely-filed response to Defendant's summary judgment motion. Rule 7.1(j) provides, in pertinent part, that "[u]pon failure of respondent to file a response and brief in opposition to the motion, the court may treat the motion as conceded and render whatever relief is asked for in the motion." LRCi 7.1(j).

Plaintiffs contend that even where no response to summary judgment is made, courts in related circumstances have held that the mere failure to comply with deadlines does not warrant the striking of evidence. Plaintiffs argument is grounded upon Williams v. Rene, 72 F.3d 1096 (3d Cir. 1995) and DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978). Plaintiffs' reliance on these two cases is misplaced. These cases do not involve uncontested Rule 56 motions. Rather, Williams and DeMarines discuss the factors the court must look at when excluding a witness' testimony because of failure to comply with pretrial notice requirements. Williams 72 F.3d at 1103 (citing DeMarines 580 F.2d at 1201-102).

Next, Plaintiffs argue that because the Court may enlarge the time for filing a response, the Court should consider Plaintiffs' untimely response to Defendant's summary judgment motion. Plaintiffs cite Fed. R. Civ. P. 6(b) which authorizes the Court to enlarge the time for response, "even after expiration of the specified period . . . where the failure to act was the result of excusable neglect." Plaintiffs offer the following excuses for why Plaintiffs' counsel failed to file a

timely response: (1) counsel's attack of the flu made it physically impossible for her to complete the response to the Motion for Summary Judgment; (2) counsel, although not fully recovered from the flu, in good faith believed that a stipulated extension of time had been filed when she left to attend a continuing legal education (CLE) conference; (3) the response to Defendant's Motion for Summary Judgment "required counsel to cull information from files filling more than six (6) banker boxes and to review over thirty depositions, several over 100 pages long, along with requisite exhibits. This was in addition to counsel's normal caseload and a severe bout of the flu." Plts.' Motion for Oral Argument and Evidentiary Hearing at 3.

In accordance with the Third Circuit's decision in Anchorage, the Court declines to consider Plaintiffs' excuses. In Anchorage, the court states

> [Rule 7(j)][5] applies to all motions, under all circumstances, including those filed in diligently litigated cases. . . .[T]he rule's purpose is to facilitate the court's disposition of motions. It authorizes the court to grant applications solely on the basis of information that the moving party puts before the court unless there is some response indicating that a genuine controversy exists concerning the right to the relief sought. *The rule does not contemplate that the court will exercise discretion as to whether, for example, the opposing party's failure to respond was due to excusable neglect* or whether the movant will suffer prejudice if the motion is denied. Indeed the objective of the rule would be defeated if the district court had to stop and investigate such matters before acting.

Anchorage, 922 F.2d at 174 (emphasis added).

Next, Plaintiffs erroneously argue that the Court must consider the factors enumerated in Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863 (3d. Cir. 1984) before entering summary judgment on an uncontested Rule 56 motion. According to Plaintiffs, before the harsh sanction

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[5] The court in Anchorage cites Virgin Islands Local Rule 6(i). Identical language to Local Rule 6(i) has been reincorporated into updated local rules as LRCi 7.1(j).

of dismissal is imposed, the Court must determine whether the conduct of counsel and/or the client meet some or all of the six part test enunciated in Poulis.[6] Thus, Plaintiffs appear to characterize relief under Rule 56 as a sanction. Plaintiffs' argument directly contradicts the Third Circuit's holding in Anchorage. In that case, the court states "[w]e have never held . . . that consideration of Poulis type factors is required before a court enters a summary judgment on an uncontested Rule 56 motion and we decline to do so in this case. Summary judgment under Rule 56 is not entered as a sanction." Anchorage, 922 F.2d at 178. Therefore, contrary to Plaintiffs' assertion, the Court need not consider the Poulis factors before entering summary judgment.

It should also be noted that the Court's refusal to consider Plaintiffs' response to Defendant's summary judgment motion does not mean judgment will be entered in favor of Defendant. The Third Circuit has held that the fact that an adverse party fails to respond to a summary judgment motion does not mean the moving party is automatically entitled to relief under Rule 56. See Anchorage, 922 F.2d at 175 (citing Fed. R. Civ. P. 56(e)). Rather, Fed. R. Civ. P. 56(e) provides that "if the adverse party does not respond, summary judgment, *if appropriate*, shall be entered against the adverse party." Id. (emphasis added). In other words, the moving party must show that because no genuine issues of material fact exist, it is entitled to

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[6] The Poulis factors are as follows:
(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. Poulis 747 F.2d at 868.

summary judgment as a matter of law. Anchorage, 922 F.2d at 175.

In sum, although the Court, in its discretion, may consider Plaintiffs' untimely response to Defendant's Motion for Summary Judgment, the Court in the instant case declines to do so. The Court has already granted Plaintiffs three extensions of time in which to respond to Defendant's summary judgment motion. See Cable/Home Communication v. Network Prods., 902 F.2d 829 (11th Cir. 1990) (the district court did not abuse its discretion in denying a second extension of time for plaintiffs to respond to a summary judgment motion); see also Macintosh v. Antonino, 71 F.3d 29, 38 (1st Cir. 1995) (upholding a district court's refusal to grant a third extension of time to file a response to summary judgment). Moreover, the Court's January 12, 2000 Order, granting Plaintiffs a final extension, expressly stated that no further extensions would be granted[7] and warned that if Plaintiffs failed to respond by the final deadline date of January 19, 2000, the Court would consider Defendant's summary judgment motion without response from Plaintiffs. Accordingly, the Court will strike Plaintiffs' untimely-filed summary judgment response.

III. Motion for Sanctions

Finally, Defendant requests that the Court sanction Plaintiffs' counsel for in effect filing an unauthorized response to summary judgment in direct contradiction to this Court's February 4, 2000 Order denying Plaintiffs' Motion to File a Response to Summary Judgment *nunc pro tunc*. See Order dated February 4, 2000. Rule 7.1(g) authorizes the Court to impose sanctions when a

[7] The Court did indeed deny such a further extension when it denied Plaintiffs' Motion to File a Response to Summary Judgment *nunc pro tunc*. See Order dated February 4, 2000.

party files a memorandum without leave of the Court.[8] LRCi 7.1(g). By filing the instant motion for oral argument and evidentiary hearing and attaching as an exhibit the very document this Court had previously denied Plaintiffs leave to file, Plaintiffs have violated Rule 7.1(g). Thus, according to the plain language of Rule 7.1(g) sanctions are appropriate in the instant case.

ENTER:

DATED: July ____, 2000

_____
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Orinn F. Arnold
Clerk of Court
by: _____
Deputy Clerk

[8] Specifically, Rule 7.1(g) provides:

> Only a motion, a response in opposition, and a reply may be served on counsel and filed with the court; further response or reply may be made only by leave of court, obtained before filing (*counsel will be sanctioned for violation of this limitation*).

LRCi 7.1(g) (emphasis added).

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Defendant.	)	
_____	)	(consolidated)
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CYRIL DONOVAN and ETHEL DONOVAN,	)	
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Plaintiffs,	)	
	)	CIVIL NO. 1997-59
v.	)	
	)	
THOMAS HOWELL GROUP,	)	
	)	
Defendant.	)	
_____	)	

ORDER

Presently before the Court are the following motions: (1) Plaintiffs Peyton Bryant ("Bryant") and Cyril and Ethel Donovan's ("Donovan") Request for Oral Argument and Evidentiary Hearing; (2) Defendant Thomas Howell Group's ("THG") Motion to Strike the Attachments to Plaintiffs' Request for Oral Argument and Evidentiary Hearing; and (3) Defendant THG's Motion for Sanctions. For the reasons stated in the attached Memorandum Opinion, it is hereby

ORDERED that Plaintiffs' Request for Oral Argument and Evidentiary Hearing is **DENIED**. It is further

ORDERED that Defendant THG's Motion to Strike the Attachments to Plaintiffs'

Request for Oral Argument and Evidentiary Hearing is **GRANTED**. It is finally

ORDERED that Defendant THG's Motion for Sanctions is **GRANTED**. Defendant will file an affidavit for fees and costs incurred as a result of Plaintiffs filing their instant motion.

ENTER:

DATED: July ____, 2000

_____
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Orinn F. Arnold
Clerk of Court
by: _____
Deputy Clerk

cc: Glenda Cameron, Esq.
Michael Sanford, Esq.